

5

United States
Circuit Court of Appeals
For the Ninth Circuit.

CONSOLIDATED CHOLLAR GOULD & SAV-
AGE MINING COMPANY, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States
Board of Tax Appeals

FILED

AUG 11 1942

No. 10198

United States
Circuit Court of Appeals
For the Ninth Circuit.

CONSOLIDATED CHOLLAR GOULD & SAV-
AGE MINING COMPANY, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States
Board of Tax Appeals

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer:	
No. 104195	16
No. 105095	30
Appearances	1
Certificate of Clerk to Transcript of Record...	90
Decision:	
No. 104195	80
No. 105095	81
Designation of Contents of Record on Review to the U. S. Board of Tax Appeals.....	88
Designation of Record and Statement of Points on Which Appellant Intends to Rely, Cir- cuit Court of Appeals.....	92
Docket Entries:	
No. 104195	1
No. 105095	3
Findings of Fact and Opinion.....	71
Notice of Filing Petition for Review and State- ment of Points.....	87

Index	Page
Opinion	75
Petition for Redetermination of Deficiency:	
No. 104195	6
Exhibit A—Notice of Deficiency.....	11
No. 105095	19
Exhibit A—Notice of Deficiency.....	25
Petition for Review and Statement of Points .	82
Statement of Points and Notice of Filing Peti- tion for Review to the U. S. Circuit Court of Appeals	87
Statement of Points on Which Appellant In- tends to Rely and Designation of Record to Circuit Court of Appeals.....	92
Transcript of Proceedings.....	33
Statement of Case:	
On Behalf of Petitioner.....	34
On Behalf of Respondent.....	37
Witnesses for Petitioner:	
Barton, Thos. V.	
—direct	54
—cross	62
—recalled, redirect	64
—recross	66
—redirect	68

Witnesses for Petitioner (Continued):

Slosson, Jr., Henry L.

—direct	39
—cross	47
—recalled, redirect	64

APPEARANCES

For Taxpayer:

WILLIAM A. BOEKEL, Esq.,
JOHN CUMMINGS, Esq.,
JOHN D. GALLAHER, Esq.

For Comm'r:

HARRY HORROW, Esq.

Docket No. 104195

CONSOLIDATED CHOLLAR GOULD & SAV-
AGE MINING COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1940

- Aug. 10—Petition received and filed. Taxpayer notified. Fee paid.
- Aug. 12—Copy of petition served on General Counsel.
- Aug. 10—Request for Circuit hearing in San Francisco, Calif., filed by taxpayer. 8/12/40 copy served.
- Sept. 3—Notice of appearance of William A. Boekel as counsel for taxpayer filed.
- Oct. 1—Answer filed by General Counsel.
- Oct. 4—Copy of answer served on taxpayer.

Docket Entries—(Continued)

1941

- April 8—Hearing set June 16, 1941, San Francisco, California.
- June 27—Hearing had before Mr. Kern on the merits. Submitted. (Consolidated.) Appearance of John D. Gallaher filed at hearing. Briefs due 8/11/41. Reply briefs due 9/10/41.
- July 14—Transcript of hearing June 27, 1941, filed.
- Aug. 11—Brief filed by taxpayer. 8/12/41 copy served.
- Aug. 11—Brief filed by General Counsel.
- Sept. 10—Reply brief filed by taxpayer. 9/11/41 copy served.
- Sept. 10—Reply brief filed by General Counsel.

1942

- Feb. 4—Findings of fact and opinion rendered. Kern, #16. Decisions will be entered pursuant to Rule 50. 2/7/42 copy served.
- Mar. 4—Computation as to deficiency filed by General Counsel.
- Mar. 5—Hearing set April 8, 1942, on settlement.
- Mar. 23—Consent to settlement filed by taxpayer.
- Mar. 25—Decision entered. Arundell, Div. 7.
- June 24—Petition for review by U. S. Circuit Court, 9th Circuit, and statement of points filed by taxpayer.
- June 24—Proof of service filed. [1*]

*Page numbering appearing at top of page of original certified Transcript of Record.

Docket Entries—(Continued)

1942

- June 24—Designation of contents of record filed by taxpayer. Proof of service thereon.
- June 26—Proof of service of petition for review filed.
- July 6—Certified copy of order from the 9th Circuit re transmission of certain original exhibits designated as Exhibits Nos. P-1, P-2, P-3, and P-4, received in evidence in lieu of copies to be safely kept by the Clerk of this Court and to be returned to the Clerk of the Board of Tax Appeals upon the final decision filed. [2]

Docket No. 105095

CONSOLIDATED CHOLLAR GOULD & SAV-
AGE MINING COMPANY, a corporation,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1940

- Oct. 7—Petition received and filed. Taxpayer notified. Fee Paid.
- Oct. 7—Copy of petition served on General Counsel.

Docket Entries—(Continued)

1940

- Oct. 7—Request for Circuit hearing in San Francisco, California, filed by taxpayer. 10/7/40 copy served.
- Dec. 4—Answer filed by General Counsel.
- Dec. 10—Copy of answer served on taxpayer. San Francisco, Calif.

1941

- April 8—Hearing set June 16, 1941, San Francisco, California.
- June 27—Hearing had before Mr. Kern on the merits. Submitted. (Consolidated.) Appearance of John D. Gallaher filed at hearing. Briefs due 8/11/41. Reply briefs due 9/10/41.
- July 14—Transcript of hearing June 27, 1941, filed.
- Aug. 11—Brief filed by taxpayer. 8/12/41 copy served.
- Aug. 11—Brief filed by General Counsel.
- Sept. 10—Reply brief filed by taxpayer. 9/12/41 copy served.
- Sept. 10—Reply brief filed by General Counsel.

1942

- Feb. 4—Findings of fact and opinion rendered. Kern, #16. Decision will be entered pursuant to Rule 50. 2/7/42 copy served.
- Mar. 4—Computation as to deficiency filed by General Counsel.
- Mar. 5—Hearing set April 8, 1942, on settlement.

Docket Entries—(Continued)

1942

- Mar. 23—Consent to settlement filed by taxpayer.
- Mar. 25—Decision entered. Arundell, Div. 7.
- June 24—Petition for review by U. S. Circuit Court, 9th Circuit, and statement of points filed by taxpayer.
- June 24—Proof of service filed. [3]
- June 24—Designation of contents of record filed by taxpayer. Proof of service thereon.
- June 26—Proof of service of petition for review filed.
- July 6—Certified copy of order from the 9th Circuit re transmission of certain original exhibits designated as Exhibits Nos. P-1, P-2, P-3, and P-4, received in evidence in lieu of copies to be safely kept by the Clerk of this Court and to be returned to the Clerk of the Board of Tax Appeals upon the final decision filed. [4]

United States Board of Tax Appeals

Docket No. 104195

CONSOLIDATED CHOLLAR GOULD & SAV-
AGE MINING COMPANY, a corporation,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, San Francisco Division IRA:90-D DCE (C:TS:PD:SF:CCG) dated May 14, 1940, and as a basis of its proceeding alleges as follows:

1. The Petitioner is a corporation organized under and by virtue of the laws of the State of California, with its principal office at Room 1122 Kohl Building, California and Montgomery Streets, San Francisco, California. The return for the period here involved was filed with the collector for the first district of California.

2. The notice of deficiency a copy of which together with the statement of the internal revenue agent in charge accompanying the same is attached hereto and marked Exhibit "A", was mailed to the petitioner on or about May 14, 1940. [5]

3. The taxes in controversy are income taxes

for the calendar year 1936 and in the amount of approximately \$2,710.89.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in disallowing percentage depletion allowable under section 114(b) (4) of the Revenue Act of 1936 in the sum of \$8,907.06.

(b) The Commissioner erred in holding as a matter of law that no percentage depletion under said section is allowable on the income derived from so-called mining dumps.

(c) The Commissioner erred in finding as a matter of fact that the precious metals derived from said so-called dumps were not a natural deposit.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner is a consolidated corporation created by the consolidation under and by virtue of the laws of the State of California on or about the 25th day of February, 1933, of Chollar Gold and Silver Mining Company, Gould and Curry Mining Company and Savage Gold and Silver Mining Company, all corporations organized under the laws of the State of California.

(b) On or about the 1st day of July, 1933, Bullion Gold and Silver Mining Company acquired by deed from Sutro Tunnel Coalition, Inc. and James O. Leonard, and on or about said date petitioner acquired from said Bullion Gold and Silver Mining

Company, by purchase, property known and referred to as the American Flat Property, upon which the mines and dumps hereinafter [6] mentioned are located at Virginia City in the State of Nevada, and petitioner was at all times during the year 1936 the owner in fee thereof.

(c) Prior thereto the predecessors of said Bullion Gold and Silver Mining Company and of its predecessors Sutro Tunnel Coalition, Inc. and James O. Leonard, had removed from said mines a quantity of natural deposit ore material and deposited and placed the same adjacent to said mines.

(d) Said material adjacent to said mines was upon said property at the time of the acquisition thereof by petitioner, known and referred to as the Yellow Jacket and Belcher dumps, and was included in said purchase as a part of said mines and appurtenances purchased from said Bullion Gold and Silver Mining Company.

(e) During the calendar year 1936 petitioner processed said material constituting said so-called dumps and removed precious metals therefrom, and derived income therefrom which is the subject matter of this proceeding.

(f) During said calendar year 1936 petitioner paid royalties of \$1,801.33 to Sutro Tunnel Coalition, Inc. for the use of a drainage tunnel in connection with said properties and the sum of \$1,235.77 to Minerals Separation Company for the use of a milling process by which said so-called dumps were processed on the basis of one cent per ton for

each ton of ore milled during said year, and other royalties for other purposes.

(g) Petitioner filed its first income tax return for the calendar year 1933 and elected at the time of making said return to have the depletion allowance for such property for the [7] taxable year 1934 and subsequent taxable years computed with regard to percentage depletion under the provisions of section 114(b)(4) of the Revenue Act of 1932, and endorsed upon said return the following:

“Consolidated Chollar Gould & Savage Mining Company elects to have the depletion allowance on the American Flat Property, now owned and operated by it, for the year 1934 and subsequent taxable years, computed on the basis of percentage depletion.”

Petitioner filed an income tax return for the year 1934 and again elected at the time of making said return to have the depletion allowance for the taxable year 1934 and subsequent taxable years computed with regard to said percentage depletion under the provisions of section 114(b)(4) of the Revenue Act of 1934, and endorsed upon said return the following:

“Consolidated Chollar Gould & Savage Mining Company elects to have the depletion allowance on the American Flat Property, now owned and operated by it, for the year 1934 and subsequent taxable years, computed on the basis of percentage depletion.”

In said return for the year 1936, petitioner computed depletion upon said properties upon a percentage basis in accordance with said election.

(h) Said material constituting said so-called dumps was removed from said mines and left adjacent thereto by the predecessors of said Bullion Gold and Silver Mining Company, Sutro Tunnel Coalition, Inc. and James O. Leonard, during the period [8] from the year 1860 to the year 1928, and petitioner is informed and believes and upon its information and belief alleges that all or substantially all thereof was removed and left adjacent to said mines between the years 1860 and 1913.

(i) Said predecessors of petitioner removed said ore material from said mines and left the same adjacent thereto without any attempt to process the same or remove the precious metals therefrom, and said precious metals therein were at all times until removed therefrom by petitioner in the year 1936 still in place and naturally deposited in said material.

(j) No income tax depletion allowance was ever claimed at any time by any of the predecessors of petitioner with respect to said ore material.

Wherefore, the petitioner prays that this Board may hear the proceeding and may find and rule that petitioner is entitled to said depletion allowance and that there is no deficiency tax due from petitioner for the calendar year 1936, and for such

other and further orders or relief as are appropriate in the premises.

WILLIAM A. BOEKEL,
Counsel.

604 Federal Reserve Bank
Building,
San Francisco, California.

JOHN CUMMINGS,
Counsel.

760 Russ Building,
San Francisco, California. [9]

(Duly verified) [10]

EXHIBIT A

Form 1230

SN-IT-1

TREASURY DEPARTMENT

Internal Revenue Service

433 Federal Office Building,
San Francisco, California

Office of

Internal Revenue Agent in Charge

San Francisco Division

May 14, 1940.

IRA:90-D

DCE

(C:TS:PD:

SF:CCG)

Consolidated Chollar Gould &

Savage Mining Company,

1122 Kohl Building,

San Francisco, California.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1936 discloses a deficiency of \$3,625.45 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco, California for the attention of — Conference Section —. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING, Commissioner.

H.J.B.

By F. M. HARLESS,

Internal Revenue Agent in
Charge.

Enclosures:

Statement.

Form of waiver. [11]

STATEMENT

San Francisco
IRA:90-D
DCE
(C:TS:PD
SF:CCG)

Consolidated Chollar Gould & Savage
Mining Company,
1122 Kohl Building,
San Francisco, California

Tax Liability for the Taxable Year Ended
December 31, 1936

	Liability	Assessed	Deficiency
Income Tax	\$6,086.44	\$2,460.99	\$3,625.45

In making this determination of your income tax liability, careful consideration has been given to your protest dated September 27, 1939, and to the statements made at the conferences held on October 27, 1939, February 13, 1940, March 8, 1940, and March 29, 1940.

A copy of this letter and statement has been mailed to your representative, Mr. John Cummings, 760 Russ Building, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return	\$11,305.35
Unallowable deductions and additional income:	
(a) Depletion	11,305.35
Net income adjusted	<u>\$22,610.70</u>
	<u>[12]</u>

EXPLANATION OF ADJUSTMENTS

(a) You have elected to have depletion computed on the basis of percentage depletion under the provisions of Section 114(b) (4) of the Revenue Act of 1936. On your return there was deducted \$11,305.35 as depletion, said amount representing 50% of the net income reported from all operations.

The net taxable income of \$22,610.70 was derived from the following sources:

Profit from milling dump ores	\$71,211.40	
Loss from mining operations	53,397.29	
	<hr/>	
Net taxable income, company operations		\$17,814.12
Profit from treating ores purchased on a royalty basis:		
From: Consolidated Virginia Mining Co.	\$ 3,687.74	
George K. Allen	1,108.84	4,796.58
	<hr/>	<hr/>
Total net income		<u>\$22,610.70</u>

You are in agreement that the profit in the total amount of \$4,796.58 derived from milling ores not mined by you but purchased in consideration of royalty payments must be excluded in computing net income for the purpose of determining allowable depletion. It is your present contention that

since 15% of the gross income from all company ores treated is greater than 50% of the net operating income of \$17,814.12, which amount includes a profit derived from milling dump ores, you are entitled to \$8,907.06 as a deduction for depletion.

It is held that since mining operations resulted in a loss, no depletion is allowable under section 114(b) (4) of the Revenue Act of 1936. [13]

COMPUTATION OF TAX

Excess-profits Tax:	
Taxable net income	\$22,610.70
Less:	
10% of \$517,457.50 value of capital stock as declared in your capital stock tax return for year ended June 30, 1936	51,745.75
	<hr/>
Net income subject to excess-profits tax	\$ None
	<hr/> <hr/>
Income Tax:	
Normal tax:	
Taxable net income	\$22,610.70
	<hr/>
8% of \$ 2,000.00 (Over 0 to \$ 2,000)	\$ 160.00
11% of \$13,000.00 (Over \$ 2,000 to \$15,000)	1,430.00
13% of \$ 7,610.70 (Over \$15,000 to \$40,000)	989.39
	<hr/>
Total normal tax	\$ 2,579.39
	<hr/>
Surtax on Undistributed Profits:	
Taxable net income	\$22,610.70
Less: Normal tax	2,579.39
	<hr/>
Undistributed adjusted net income	\$20,031.31
Less: Specific credit	2,996.87
	<hr/>
Remainder subject to surtax	\$17,034.44
	[14]

COMPUTATION OF TAX—(Continued)

7% of \$2,003.13	\$ 140.22
12% of 2,003.13	240.38
17% of 4,006.26	681.06
22% of 4,006.26	881.38
27% of 5,015.66	1,354.23
	<hr/>
Amount of Tax	\$ 3,297.27
Plus:	
7% of \$2,996.87 (specific credit)	209.78
	<hr/>
Total surtax	\$ 3,507.05
Normal tax	2,579.39
	<hr/>
Total income tax (normal tax and surtax)	\$ 6,086.44
Income tax assessed (normal tax and surtax):	
Original, account No. 401704	
First California District	2,460.99
	<hr/>
Deficiency of income tax	<u>\$ 3,625.45</u>

[Endorsed]: U.S.B.T.A. Filed Aug. 10, 1940. [15]

[Title of Board and Cause—Docket No. 104195.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the tax in controversy is income tax for the calendar year 1936; denies the remaining allegations contained in paragraph 3 of the petition.

4(a) to (c), inclusive. Denies that the Commissioner erred as alleged in subparagraphs (a) to (c), inclusive, of paragraph 4 of the petition. [16]

5(a) and (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

5(c). Admits that prior thereto the predecessors of said Bullion Gold and Silver Mining Company and Sutro Tunnel Coalition, Inc. and James O. Leonard had removed from said mines a quantity of ore material; denies the remaining allegations contained in subparagraph (c) of paragraph 5 of the petition.

5(d). Admits that the petitioner acquired by purchase certain materials known as the Yellow Jacket and Belcher dumps; denies the remaining allegations contained in subparagraph (d) of paragraph 5 of the petition.

5(e) and (f). Admits the allegations contained in subparagraphs (e) and (f) of paragraph 5 of the petition.

5(g). Admits the allegations contained in subparagraph (g) of paragraph 5 of the petition except that the allegations contained in the last sentence of said subparagraph are denied.

5(h). Admits that the material constituting said dumps was removed from said mines by the prede-

cessors of said Bullion Gold and Silver Mining Company, Sutro Tunnel Coalition, Inc. and James O. Leonard prior to 1928; denies the remaining allegations contained in subparagraph (h) of paragraph 5 of the petition.

5(i) and (j). Denies the allegations contained in subparagraphs (i) and (j) of paragraph 5 of the petition. [17]

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL,

T. M. M.

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,
Division Counsel.

T. M. MATHER,
HARRY R. HORROW,
Special Attorneys,
Bureau of Internal Revenue.

HRH:sob 9/24/40.

[Endorsed]: U.S.B.T.A. Filed Oct. 1, 1940. [18]

United States Board of Tax Appeals

Docket No. 105095

CONSOLIDATED CHOLLAR GOULD & SAV-
AGE MINING CO., a corporation,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, San Francisco Division IRA: 90-D dated July 11, 1940, and as a basis of its proceeding alleges as follows:

1. The Petitioner is a corporation organized under and by virtue of the laws of the State of California, with its principal office at Room 1122 Kohl Building, California and Montgomery Streets, San Francisco, California. The return for the period here involved was filed with the collector for the first district of California.

2. The notice of deficiency a copy of which together with the statement of the internal revenue agent in charge accompanying the same is attached hereto and marked Exhibit "A", was mailed to the petitioner on or about July 11, 1940. [19]

3. The taxes in controversy are income taxes

for the calendar year 1938 and in the amount of approximately \$655.45.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in disallowing percentage depletion allowable under section 114(b) (4) of the Revenue Acts of 1934, 1936, 1938 in the sum of \$4,543.53.

(b) The Commissioner erred in holding as a matter of law that no percentage depletion under said section is allowable on the income derived from so-called mining dumps.

(c) The Commissioner erred in finding as a matter of fact that the precious metals derived from said so-called dumps were not a natural deposit.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner is a consolidated corporation created by the consolidation under and by virtue of the laws of the State of California on or about the 25th day of February, 1933, of Chollar Gold and Silver Mining Company, Gould and Curry Mining Company and Savage Gold and Silver Mining Company, all corporations organized under the laws of the State of California.

(b) On or about the 1st day of July, 1933, Bullion Gold and Silver Mining Company acquired by deed from Sutro Tunnel Coalition, Inc. and James O. Leonard, and on or about said date petitioner acquired from said Bullion Gold [20] and

Silver Mining Company, by purchase, property known and referred to as the American Flat Property, upon which the mines and dumps hereinafter mentioned are located at Virginia City in the State of Nevada, and petitioner was at all times during the year 1938 the owner in fee thereof.

(c) Prior thereto the predecessors of said Bullion Gold and Silver Mining Company and of its predecessors Sutro Tunnel Coalition, Inc. and James O. Leonard, had removed from said mines a quantity of natural deposit ore material and deposited and placed the same adjacent to said mines.

(d) Said material adjacent to said mines was upon said property at the time of the acquisition thereof by petitioner, known and referred to as the Yellow Jacket and Belcher dumps, and was included in said purchase as a part of said mines and appurtenances purchased from said Bullion Gold and Silver Mining Company.

(e) During the calendar year 1936, petitioner processed a portion of said material constituting said so-called dumps and removed precious metals therefrom and derived income therefrom which is the subject matter of proceeding No. 104195 now pending before the Board of Tax Appeals. During the calendar year 1938, petitioner processed a portion of said material constituting said so-called dumps and removed precious metals therefrom and derived income therefrom which is the subject matter of this proceeding. [21]

(f) During said calendar year 1938, petitioner

became liable for accrued royalties of \$1,215.39 to Minerals Separation North American Corporation for the use of a milling process by which said so-called dumps were processed, and for the further sum of \$9,212.52, accrued royalties, to Comstock Tunnel and Drainage Company for the use of a tunnel in connection with the said properties and other royalties for other purposes.

(g) Petitioner filed its first income tax return for the calendar year 1933 and elected at the time of making said return to have the depletion allowance for such property for the taxable year 1934 and subsequent taxable years computed with regard to percentage depletion under the provisions of section 114(b)(4) of the Revenue Act of 1932, and endorsed upon said return the following:

“Consolidated Chollar Gould & Savage Mining Company elects to have the depletion allowance on the American Flat Property, now owned and operated by it, for the year 1934 and subsequent taxable years, computed on the basis of percentage depletion.”

Petitioner filed an income tax return for the year 1934 and again elected at the time of making said return to have the depletion allowance for the taxable year 1934 and subsequent taxable years computed with regard to said percentage depletion under the provisions of section 114(b)(4) of the Revenue Act of 1934, and endorsed upon said return the following: [22]

“Consolidated Chollar Gould & Savage Mining Company elects to have the depletion allowance on the American Flat Property, now owned and operated by it, for the year 1934 and subsequent taxable years, computed on the basis of percentage depletion.”

In said return for the year 1938, petitioner computed depletion upon said properties upon a percentage basis in accordance with said election.

(h) Said material constituting said so-called dumps was removed from said mines and left adjacent thereto by the predecessors of said Bullion Gold and Silver Mining Company, Sutro Tunnel Coalition, Inc. and James O. Leonard, during the period from the year 1860 to the year 1928, and petitioner is informed and believes and upon its information and belief alleges that all or substantially all thereof was removed and left adjacent to said mines between the years 1860 and 1913.

(i) Said predecessors of petitioner removed said ore material from said mines and left the same adjacent thereto without any attempt to process the same or remove the precious metals therefrom, and said precious metals in the portion thereof processed during the year 1938 were at all times until removed therefrom by petitioner in the year 1938 still in place and naturally deposited in said material.

(j) No income tax depletion allowance was ever

claimed at any time by any of the predecessors of petitioner with respect to said ore material. [23]

Wherefore, the petitioner prays that this Board may hear the proceeding and may find and rule that petitioner is entitled to said depletion allowance and that there is no deficiency tax due from petitioner for the calendar year 1938, and for such other and further orders or relief as are appropriate in the premises.

WILLIAM A. BOEKEL,
Counsel.
604 Federal Reserve Bank
Building,
San Francisco, California.

JOHN CUMMINGS,
Counsel,
760 Russ Building,
San Francisco, California.

[24]

(Duly verified.) [25]

EXHIBIT "A"

Form 1230

SN-IT-1

TREASURY DEPARTMENT

Internal Revenue Service
433 Federal Office Building
San Francisco, California

Office of

Jul 11 1940

Internal Revenue Agent in Charge
San Francisco Division

IRA:90-D

GK

Consolidated Chollar Gould &
Savage Mining Company,
1122 Kohl Building,
San Francisco, California.

Sirs:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1938 discloses a deficiency of \$676.59 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San

Francisco, California for the attention of—Conference Section—. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
 GUY T. HELVERING,
 Commissioner,
 By (Sgd.) F. M. HARLESS,
 Internal Revenue Agent in
 Charge.

Enclosures:

Statement.

Form of waiver. [26]

STATEMENT

San Francisco

IRA:90-D

GK

Consolidated Chollar Gould &
 Savage Mining Company,
 1122 Kohl Building,
 San Francisco, California

Tax Liability for the Taxable Year Ended
 December 31, 1938

	Liability	Assessed	Deficiency
Income tax	\$1,244.53	\$ 567.94	\$ 676.59

In making this determination of your income tax

liability, it is noted that you did not avail yourself of the privilege of filing a protest.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return		\$4,543.52
Unallowable deductions and additional income:		
(a) Depletion disallowed	\$4,543.53	
(b) Loss on trade of automobile	338.20	4,881.73
		<hr/>
Net income adjusted		\$9,425.25
		<hr/>

EXPLANATION OF ADJUSTMENTS

(a) You claimed in your return a deduction of \$4,543.53 for depletion, this amount being fifty per cent of your reported net income before deducting depletion, and less than fifteen per cent of the net value of ore produced during the year.

Information received by this office indicates that actual mining operations conducted during 1938 resulted in a loss and that your net income for the year was derived from the milling of dump ores.

It is noted that you have elected to have the depletion allowance computed with regard to percentage depletion under the provisions of section 114(b) (4) of the Revenue Acts of 1934, 1936 and 1938. Since your mining operations resulted in a loss, no depletion is allowable for 1938. [27]

Consolidated Chollar Gould &
Savage Mining Company

Statement

EXPLANATION OF ADJUSTMENTS

(Continued)

(b) A loss of \$338.20 was claimed by you on

the trade of an automobile truck used in your business in the purchase of like equipment during 1938. Section 112(b)(1) of the Revenue Act of 1938 provides that such losses shall not be recognized for income tax purposes.

COMPUTATION OF TAX

Excess-profits Tax:		
Taxable net income		\$ 9,425.25
Less:		
Dividends received credit	None	
10% of \$1,000,000.00		
value of capital stock as		
declared in your capital		
stock tax return for		
year ended June 30,		
1938	\$100,000.00	100,000.00
Net income subject to excess-		
profits tax		None
Total excess-profits tax		None

COMPUTATION OF INCOME TAX

(Corporations with Net Incomes of Not More Than
\$25,000.00)

Net income for excess-profits tax computation	\$9,425.25
Less: Excess-profits tax	None
	<hr/>
Net income	\$9,425.25
Less: Interest on obligations of the	
United States, etc.	None
	<hr/>
Adjusted net income	\$9,425.25
Dividends received credit	
(85 per cent of dividends received	
but not in excess of 85 per cent	
of adjusted net income)	None
	<hr/>
Balance subject to income tax	\$9,425.25
	<hr/>

COMPUTATION OF TAX—(Continued)

Portion (not in excess of \$5,000) taxable at 12½%	\$5,000.00	12½%	\$ 625.00
Portion (in excess of \$5,000 and not in excess of \$20,000) taxable at 14%	4,425.25	14 %	619.53
Portion (in excess of \$20,000) taxable at 16%	None		None
			<hr/>
Total income tax			\$1,244.53
Less: Credit for income taxes paid to a foreign country or United States possession allowed to a domestic corporation			None
			<hr/>
Total income tax assessable			\$1,244.53
Income tax assessed:			
Original, account No. 400558—First California			567.94
			<hr/>
Deficiency of income tax			\$ 676.59
			<hr/>

[Endorsed]: U.S.B.T.A. Filed Oct. 7, 1940. [29]

United States Board of Tax Appeals

CONSOLIDATED CHOLLAR GOULD & SAV-
AGE MINING COMPANY, A Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

[Title of Board and Cause—Docket No. 105095.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the tax in controversy is income tax for the calendar year 1938; denies the remaining allegations contained in paragraph 3 of the petition.

4(a) to (c), inclusive. Denies that the Commissioner erred as alleged in subparagraphs (a) to (c), inclusive, of paragraph 4 of the petition. [30]

5(a) and (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

5(c). Admits that prior thereto the predecessors of said Bullion Gold and Silver Mining Company and Sutro Tunnel Coalition, Inc. and James O. Leonard had removed from said mines a quantity of ore material; denies the remaining allegations

contained in subparagraph (c) of paragraph 5 of the petition.

5(d). Admits that the petitioner acquired by purchase certain materials known as the Yellow Jacket and Belcher dumps; denies the remaining allegations contained in subparagraph (d) of paragraph 5 of the petition.

5(e). Admits the allegations contained in subparagraph (e) of paragraph 5 of the petition.

5(f). Denies the allegations contained in subparagraph (f) of paragraph 5 of the petition.

5(g). Admits the allegations contained in subparagraph (g) of paragraph 5 of the petition except that the allegations contained in the last sentence of said subparagraph are denied.

5(h). Admits that the material constituting said dumps was removed from said mines by the predecessors of said Bullion Gold and Silver Mining Company, Sutro Tunnel Coalition, Inc. and James O. Leonard prior to 1928; denies the remaining allegations contained in subparagraph (h) of paragraph 5 of [31] the petition.

5(i) and (j). Denies the allegations contained in subparagraphs (i) and (j) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL,
H. R. H.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,
Division Counsel.

T. M. MATHER,
HARRY R. HORROW,
Special Attorneys,
Bureau of Internal Revenue.

HRH:sob 11/29/40.

[Endorsed]: U.S.B.T.A. Filed Dec. 4, 1940. [32]

[Title of Board and Cause—Dockets Nos. 104195,
105095.]

TRANSCRIPT OF PROCEEDINGS

Post Office Building,
San Francisco, California

June 27, 1941.

2:00 o'clock p. m.

Before: Hon. John W. Kern,
Met pursuant to notice.

APPEARANCES

JOHN D. GALLAHER and
WILLIAM A. BOEKEL,

604 Federal Reserve Bank Building,
San Francisco, California.

JOHN CUMMINGS,

760 Russ Building,
San Francisco, California,

appearing for Consolidated Chollar Gould & Savage
Mining Company, the Petitioner. [34]

HARRY R. HORROW,

appearing for the Commissioner of Internal Revenue,
Respondent. [35]

PROCEEDINGS

The Member: Consolidated Chollar Gould &
Savage Mining Company.

Are the parties ready?

Mr. Horrow: Ready for Respondent, your Honor.

Mr. Gallaher: Ready for Petitioner.

The Member: Will counsel note their appearances in the record.

Mr. Gallaher: The appearances for the Petitioner are John D. Gallaher, William A. Boekel, and John Cummings.

William A. Boekel is an attorney at law who is counsel of record for the Petitioner. I am employed in his office. John Cummings is a certified public accountant.

I believe it is not necessary but I have a power of attorney running to myself, William A. Boekel and John Cummings which I would ask leave to file in the record.

The Clerk: Are you admitted to practice before the Board?

Mr. Gallaher: Yes, sir, I am admitted to practice before the Board.

Mr. Horrow: Harry R. Horrow for the Respondent.

The Member: May I have a short statement as to the issues that are involved?

Mr. Gallaher: Yes. [37]

STATEMENT OF CASE ON BEHALF OF THE PETITIONER

Mr. Gallaher: If your Honor please, in both of these matters the issues are precisely the same. This is an appeal from an assessment of an addi-

tional tax for the year 1936 and also for the year 1938.

The Petitioner in this matter is a mining company which in 1933 purchased certain mining properties near Virginia City, Nevada. There were on the property some so-called dumps which consisted of rock taken many years ago from adjacent mines and placed upon the lands. During the years 1936 and 1938 the Petitioner processed the dumps and extracted precious metals therefrom. The petitioner has claimed percentage depletion with respect to those operations.

The Commissioner has disallowed the claim of percentage depreciation on the ground that this transaction amounted to the reprocessing of tailings or the processing of tailings.

The issue here is whether or not the processing of that rock, which had never been processed before, is the processing of tailings within the meaning of the cases that hold that in the case of the processing of tailings a percentage depletion is not allowable. That is the principal issue in the case.

A larger part of the facts involved have been stipulated [38] to.

It is stipulated that the Petitioner is a corporation organized under the laws of California with its principal office at 1122 Kohl Building.

The Member: Has there been a written stipulation prepared?

Mr. Gallaher: No; I mean to say that these facts are admitted by the answer.

The Member: Oh, I see.

Mr. Gallaher: The corporate existence of the Petitioner is admitted by the answer. The deficiency notices are admitted by the answer.

It is admitted by the answer that on or about the first day of July 1933, Bullion Gold and Silver Mining Company acquired by deed from Sutro Tunnel Coalition, Inc., and James O. Leonard, and on or about said date Petitioner acquired from said Bullion Gold and Silver Mining Company, by Purchase, property known and referred to as the American Flat Property, upon which the mines and dumps hereinafter mentioned are located at Virginia City in the State of Nevada, and Petitioner was at all times during the year 1938 the owner in fee thereof.

The petition with respect to the 1936 taxes contains a similar allegation with respect to the year 1936 and that allegation is admitted by the answer. [39]

It is also admitted that prior thereto the predecessors of said Bullion Gold and Silver Mining Company and of its predecessors Sutro Tunnel Coalition, Inc., and James O. Leonard, had removed from said mines a quantity of natural deposit or material. The petition alleges that they deposited and placed the same adjacent to the mines. That part of the petition is denied.

It is also admitted that Consolidated Chollar Gould & Savage Mining Company, the Petitioner herein, did claim percentage depletion upon its return filed for the year 1933 and also for the year

1934 as required by Section 114(b) (4) of the Revenue Act of 1932, and as amended by the Revenue Act of 1934.

The Member: That is the sole issue that is presented?

Mr. Gallaher: I believe that is the sole issue that is presented, whether or not the petitioner is entitled to percentage depletion with respect to the processing of this waste rock which has been referred to as dumps.

The Member: Do you have anything to say, Mr. Horrow?

Mr. Horrow: Yes, your Honor.

STATEMENT OF CASE ON BEHALF OF THE RESPONDENT

Mr. Horrow: There were three types of ore materials that were processed by the Petitioner during the taxable year; one, the ore materials from these dumps which were [40] located on lands acquired by the Petitioner and, two, ore materials that were actually mined by the Petitioner and, three, ore materials which were taken by Petitioner from dumps located on lands belonging to other persons.

We concede that percentage depletion is allowable in respect of income derived from the processing of ore materials which Petitioner mined, the ore materials which were in sight, so to speak.

Now, for 1936 a deficiency notice determined that there was a loss from the mining operations. For 1938 we likewise determined that there was a loss

from the mining operations, but we are prepared to stipulate that net income was derived from the processing of ore materials that were mined by Petitioner and, I believe, we will be able to stipulate as to the amount of that net income during the course of the hearing.

I would like to say, your Honor, that our position is not that depreciation allowance should be denied in respect of the dumps because they are to be characterized as tailings but because they are not a mine and the extraction of the gold and silver content, the ore materials that were in the dumps is not a mining operation. Such materials were not ores in place and no percentage depletion is allowable in respect of any income derived therefrom.

That is our position, your Honor. [41]

The Member: All right. Call your first.

Mr. Gallaher: Mr. Slosson.

The Member: The Clerk has called to my attention the question of whether these cases have been consolidated for hearing and decision.

Mr. Gallaher: It is our desire they be consolidated if that is agreeable.

Mr. Horrow: Yes, your Honor, that is agreeable to Respondent.

The Member: The two cases will be consolidated for hearing and decision.

HENRY L. SLOSSON, JR.

a witness on behalf of Petitioner, was duly sworn and testified as follows:

The Clerk: State your full name, please.

The Witness: Henry L. Slosson, Jr.; S-l-o-s-s-o-n.

Direct Examination

Q. (By Mr. Gallaher): Where do you reside, Mr. Slosson? A. San Francisco.

Q. What is your occupation?

A. Mining Engineer.

Q. How long have you been a mining engineer?

A. For the last 35 years.

Q. You have an office in San Francisco? [42]

A. Yes, sir; 333 Kearny Street.

Q. Are you familiar with the property of the Consolidated Chollar Gould & Savage Mining Company at Virginia City, Nevada?

A. Yes, I am.

Q. How long have you been familiar with that property?

A. I have been familiar with it since 1902 when I first went to the Comstock.

Q. Have you made a study of the mining operations conducted at and near Virginia City?

A. Yes, very carefully.

Q. Will you state what you have done in making a study of those mining operations?

A. I have operated up there myself. I was President of the Mexican Mining Company at the time it had its ore body in 1916.

(Testimony of Henry L. Slosson, Jr.)

The Member: At the time it had its what?

The Witness: At the time it had its ore body in 1916. I was in control of the Yellow Jacket Mine backed by Mr. Clarence Mackey in 1907 right after the earthquake. I had control of the Yellow Jacket. It was adjoining this property I have been through on these deeper levels, through into this Chollar ground and I think I am thoroughly familiar with the details of it.

Q. (By Mr. Gallaher): Do you know of the existence of the [43] so-called dumps that are involved in this matter?

A. Yes, sir; I figured on them myself at one time.

Q. What do you mean by you "figured on them"?

A. I figured that possibly they might be workable. We had them very carefully sampled by Professor Probert of the University Mining School of the University of California, but they were too low.

Q. When was that, Mr. Slosson?

A. 1907 or 1908.

Q. When you say "They were too low" you mean what?

A. Extremely low grade.

Q. Would you be able to say what the analysis showed the grades were?

A. My recollection is they ran from \$1.80 to \$2.25. That, of course, was the old price of gold.

Q. Do you know when the dumps were removed from the mines and placed where they are now?

(Testimony of Henry L. Slosson, Jr.)

A. They were moved from a period extending from about 1872, when the famous Crown Point bonanza was developed, on to about 1898. Practically nothing was done after that time. The mines were flooded.

Q. Do you know whether or not any of the material constituting those dumps was ever processed?

A. Never processed. That dump was considered practically worthless by those old time miners because at that time the [44] cost of milling was eight or ten dollars a ton; that was prohibitive.

The Member: I call counsel's attention to the fact that the Presiding Member doesn't know what "processing" means. You might ask this witness.

Mr. Gallaher: Yes, if your Honor please.

Q. (By Mr. Gallaher): Will you please explain to the Presiding Member the meaning of the word "processing" with reference to mining?

A. Well, processing, your Honor, is the beginning of the reduction of ore for the purpose of extraction. The first process would be to mill it and pound it into an impalpable dust. From then on the process might vary. At the present date we use cyanide. In those days they worked what is known as pan amalgamation which consisted in amalgamating in the pans with the quicksilver the crushed ore. That process was very expensive but it was the only process known in the '60s and '70s, and, of course, some of these dumps are now commercially profitable which wouldn't be at that time.

(Testimony of Henry L. Slosson, Jr.)

Q. Well, you would say that the processing is the process whereby the precious metal is extracted from the rock?

A. The first step in the processing would be milling. Until you begin to mill your ore you don't process it.

Q. And this rock showed no evidence of ever having been [45] milled?

A. It had never been milled. It was waste rock that came from the mine just as it was blasted. The processing begins at that point, first, the extraction which is not processing and then comes the processing which is reduction.

Q. In the years that you mentioned, that is, from 1871 onward did the mining companies own and operate their own mills as a rule?

A. As a rule not. In early days of the Comstock, in the so-called Bonanza days there was a huge mill ring up there dominated by some very large capitalists in California, among whom D. O. Mills was very prominent. Each mine would contract to have its ore milled. They were independent milling outfits, but at the same time generally that big company known as the Union Mill & Mining Company got all the business.

Q. How far was their mill from the dumps in question?

A. Well, they had 15 or 20 mills but the nearest—there were two or three of the mills that were not far from the dump in question.

(Testimony of Henry L. Slosson, Jr.)

Q. Was it necessary to pay transportation charges on the rock to take it to the mill?

A. As a rule, yes. There was a railroad built for that purpose; that was enormously profitable.

Q. In order to make a profit on extracting the ore what [46] grade rock had to be found in those days?

Mr. Horrow: As of what date, Mr. Gallaher?

Mr. Gallaher: I am addressing myself from 1871 onward, say, to 1901.

The Witness: Will you repeat that question, please?

(The question referred to was read by the reporter as above recorded.)

A. At least \$20 underground.

The Member: What do you mean "\$20 underground"?

The Witness: \$20 of the rock stood in place in the mine would pay possibly a small profit. Today we could mine the same rock at a very much less cost.

Q. (By Mr. Gallaher): Why could you mine it at a less cost today?

A. Because you have got compressed air; you have got electric power which they didn't have in those days. All drilling was done by hand. There was no electric power on the ground. Power was maintained by steam, maintained at a cost of about \$20 per horsepower per month. Today you can get

(Testimony of Henry L. Slosson, Jr.)

it for \$4.00 per horsepower per month. Vast improvements have been made. The cost of milling was twelve or fifteen dollars for milling and they guaranteed a 65 per cent extraction of the precious metals. The result is \$20 rock would just about make the amount even, if you were lucky. [47]

Q. (By Mr. Gallaher): Do you know whether or not the rock constituting these dumps is \$20.00 rock? A. The dumps?

Q. Yes.

A. Oh, no. As I say, my samples were from about 85 cents to \$2.25 when Professor Probert and I went through.

Q. You could say, then, that the rock could not have been milled in the old days, as you put it, at a profit?

A. Hopeless. They threw it out and never expected it to be touched, those old-timers. They used it to fill up chuck holes in the streets.

Q. Will you explain to the Court the meaning of the word "tailings", used with respect to mining operations?

Mr. Horrow: How is that material, counsel? How is that relevant to the issue presented here?

Mr. Gallaher: Well, I believe that the Commissioner has taken the position that under the regulations and the cases that depletion is not allowable, percentage depletion is not allowable with respect to the processing of tailings.

The Member: Well, let's have the witness testify with regard to it. It may or may not be relevant.

(Testimony of Henry L. Slosson, Jr.)

Mr. Horrow: Very well.

A. The question was on tailings, as I understood it?

Q. (By Mr. Gallaher): Yes.

A. Tailings, your Honor, are the products of the mill after [48] it is crushed into impalpable powder and processed by whatever process may be used. The tailings flow out of the mill and are generally deposited in some place where they won't spread all over the country and there they stay.

Now, the tailings is the product of the mill after the ore has been treated and the dumps are the product of the mine before it has been treated.

Q. Are the dumps in question tailings in any sense of the word?

A. Oh, no, not to any mining engineer.

The Member: Who owned that Union Mill that you were talking about?

The Witness: The Union Mill & Mining Company was a corporation that was formed in '65 or '66. The Bank of California had loaned money on a number of mills up on the Comstock which were custom mills and the Comstock looked very sick about 1864. The ore began to give out. It looked as though the jig was up. Suddenly an ore body was discovered. When the bank found there was liable to be a repetition of riches in depth they foreclosed on all these mills, took them into a syndicate, froze out the old owners. This D. O. Mills, William C. Ralston, Alvinza Hayward and William

(Testimony of Henry L. Slosson, Jr.)

Sharon, who afterwards built the Palace Hotel, they organized this ring and took the whole thing in and it was enormously profitable. They were said to make [49] five or six million dollars per year just on contract milling.

The Member: Any other questions?

Mr. Gallaher: Yes, I have one further question.

Q. (By Mr. Gallaher): Mr. Slosson, when the rock was removed from the mines and deposited where it is now was it changed other than being broken up?

A. No; it came as it was blasted from the mine.

Q. Such metal as is contained in the rock is still naturally deposited in that rock?

A. In the rock.

Mr. Horrow: Just a moment. I object to that on the ground it calls for a conclusion of the witness and is argumentative, your Honor.

The Member: Overruled.

Mr. Gallaher: The question was whether the ore is still naturally deposited in the rock.

Mr. Horrow: He testified what the rock was. The ore materials were taken from underground and deposited on the surface.

The Member: Any other questions?

Mr. Gallaher: Would you read the question?

The Member: I will overrule the objection.

Mr. Horrow: Exception.

The Member: Exception noted. [50]

(Testimony of Henry L. Slosson, Jr.)

(The question referred to was read by the reporter as above recorded.)

A. Yes, it is.

Cross-Examination

Q. (By Mr. Horrow): Mr. Slosson, I believe you stated that you were familiar with the property which is known as the American Flat property?

A. Yes, sir.

Q. Do you know the boundaries of that property?

A. Well, I know them in a general way. I know them particularly on the north; I am not so familiar on the south.

Q. Do you know the shafts that existed on that property at the time the so-called dumps were observed by you in 1907?

A. You mean the shafts on the Chollar property?

Q. I am speaking of the——

A. Or the general line of shafts along the Comstock?

Q. I am speaking of the mining shafts that were located on the property which has been referred to as the American Flat property.

A. There is one; I am familiar with that shaft, yes, sir.

Q. What was the name of that shaft?

A. The old Overman shaft.

Q. The Overman shaft?

A. The Overman shaft.

(Testimony of Henry L. Slosson, Jr.)

The Reporter: Spell it, please. [51]

The Witness: O-v-e-r-m-a-n.

Q. (By Mr. Horrow): Now, you referred to the Yellow Jacket. A. Yes, sir.

Q. Was that another shaft?

A. That was a shaft belonging to a mine that laid at the north—perhaps I can make it clear to you.

Q. Just let me ask the questions, Mr. Slosson. Then, maybe we can clear this thing up.

A. All right.

Q. Now, how far away was the Yellow Jacket Shaft from the dumps?

A. Well, the Yellow Jacket had 700 feet of ground; about 2000 feet.

Q. About how many feet?

A. About 2000 feet, between 1500 and 2000 feet.

Q. And is it your testimony that the ore materials which constituted the dumps came out of the Yellow Jacket?

A. The Yellow Jacket, the Crown Point, and the Belcher; there were three mines along there that produced ore.

Q. Just a moment. Some of them came out of the Yellow Jacket?

A. Out of the Yellow Jacket.

Q. Now, was there another mining shaft from which the ore materials were—

A. (Interposing): Hoisted? [52]

Q. (Continuing): Conveyed after they had been extracted from the earth?

(Testimony of Henry L. Slosson, Jr.)

A. From the mine, yes, sir. There was another shaft immediately south of the Yellow Jacket, the Kentuck.

Q. The Kentuck?

A. K-e-n-t-u-c-k.

Q. Now, how far away was that mining shaft from the dumps?

A. Well, that is about the same distance as the Yellow Jacket; the Kentuck was right next to the Jacket.

Q. And that Kentuck shaft is not located on the property known as the American Flat property?

A. No, sir.

Q. Now, was there any other shaft from which the ore materials were brought to the surface and placed in the dumps?

A. Yes, sir, there was the Crown Point.

Q. Now, what was the location of that shaft with respect to the location of the dumps?

A. That was just about a hundred feet away from the Kentuck, 200 feet away from the Kentuck.

Q. That shaft likewise was not on the American Flat property?

A. No; a long way from it. There was still another shaft, if you wish to know it.

Q. Now, you stated that at the time, in 1907, you were in charge of the Yellow Jacket?

A. Yes, I controlled it. [53]

Q. So that you were familiar with the property that was owned and used in connection with the Yellow Jacket?

(Testimony of Henry L. Slosson, Jr.)

A. Yes, sir, familiar with all that end of the lode.

Q. Now, was the land on which the dumps were located owned by you or by your corporation?

A. It was not owned; we had dumping privileges on it.

Q. Now, what do you mean "dumping privileges"?

A. Well, owing to the configuration of the ground near the Yellow Jacket—there was tremendous big ravines. The Crown Point shaft was right in the middle of the ravine. If we dumped the Yellow Jacket waste in the ravine we killed the Crown Point. The Crown Point had no dumping place, so all those gold mines many years before made some arrangement, the details of which I don't know, to have dumping ground to the south where we had area to spread it out.

Q. Who owned the American Flat property?

A. The Overman Mining Company.

The Member: May I interrupt just a moment to get some facts here? You say that if you would dump it down on the Crown Point it would kill the Crown Point. How would it kill it?

The Witness: Cover it up. The shaft was right in the middle of the ravine.

The Member: Oh, I see.

The Witness: Had they dumped in the ravine the Crown [54] Point would be down and out.

The Member: Yes, I see.

(Testimony of Henry L. Slosson, Jr.)

Q. (By Mr. Horrow): Now, Mr. Slosson, can you state whether any ore materials were conveyed to the surface through the Overman shaft and deposited in the dumps?

A. No; the Overman had a dump of its own right near the shaft.

Q. So the dumps that we are talking about didn't cover any ore materials that came out of the Overman shaft? A. No.

Q. And the Overman shaft was the only shaft that was located on the American Flat property?

A. The Overman shaft was the only shaft on the present Chollar ground.

Q. Well, now, you spoke of a dumping privilege. Did you have to pay for that privilege?

A. Well, that was way back in the '70s before I was born and I couldn't swear to it. All our records were destroyed in the fire in 1906. It would be a very difficult thing to prove.

Q. Well, in 1907 when you owned the Yellow Jacket did you consider that you owned the ore materials that came out of the Yellow Jacket and were in the dumps?

A. No, we didn't consider we owned them. We were trying to make a dicker with the Overman Mining Company at that time to see if we couldn't work them. [55]

Q. So that Overman, the owner of the American Flat property, was considered as the owner of the dumps?

A. Considered as the owner of the dumps but

(Testimony of Henry L. Slosson, Jr.)

the dumps were not produced by the Overman mine. They were just there.

Q. Yes. And Overman was considered the owner of the dumps because the ore materials were deposited on Overman's land pursuant to these privileges of dumping?

A. We figured we couldn't get these dumps off without consulting with somebody who owned the land.

Q. So your answer is "Yes", then, isn't it, Mr. Slosson? A. Yes, sir.

Q. Now, what was the method of conveying the ore materials from the head of the shaft to the dumps?

A. Which mine do you mean? The Yellow Jacket?

Q. From the Yellow Jacket? Take each mine.

A. We would hoist the rock through the Yellow Jacket shaft and run it through the bin, dumped it into a bin and then it was carried out on an iron car with an old mule, about a six-ton car.

Q. It was hauled by mules?

A. By mule way out to the end of that dump to get it out of the way.

Q. Now, was there any sorting process at the head of the shaft prior to the conveyance by mule to the dumps?

A. No, none whatever. [56]

Q. Well, wasn't the ore material assayed in order to determine its gold and silver content before you removed it to the dumps?

(Testimony of Henry L. Slosson, Jr.)

A. Oh, yes, assayed underground. The face of the drift is sampled.

Q. And do you know what methods were used to convey the ore materials from the head of the Kentucky and the—

A. (Interposing): Crown Point?

Q. Crown Point shaft?

A. Both those shafts were in a ruinous condition in 1907; nothing was being done to them at all.

Q. Well, do you know the methods that were used to convey ore materials from those mines over to the dumps on the American Flat?

A. Well, it was the same method; they ran out on the same track.

Q. It was the same method?

A. It was the same method exactly.

Q. Now, how did these dumps look in 1907? Would you describe them, just what—

A. (Interposing): Well, they were a very long pile of rock that ran there for, I should say, several hundred feet and the angle of repose, which is 35 degrees—the coarser rock was at the bottom, the finer rock at the top. The coarse rock rolls down; the dump goes to the bottom, as [57] a rule. For that reason in sampling a dump of that kind we would sample it half way up to try and get an average, which was very disappointing.

Q. It was simply piled up as waste material?

A. As waste; it was considered by people who piled it there as absolute waste.

(Testimony of Henry L. Slosson, Jr.)

Q. Now, the materials as they came out of the shaft were broken up by blasting, were they not?

A. They broke in the blast, yes. It was shov-
elable; you could shovel it. Otherwise, of course,
you couldn't get it out.

Mr. Horrow: That is all.

Mr. Gallaher: That is all.

The Member: That is all.

(Witness excused.)

Mr. Gallaher: Mr. Barton.

THOMAS V. BARTON

a witness on behalf of Petitioner, was duly sworn
and testified as follows:

The Clerk: Your full name, please, sir?

The Witness: Thomas V. Barton.

The Member: What is the last name?

The Witness: Barton, B-a-r-t-o-n.

Direct Examination

Q. (By Mr. Gallaher): Mr. Barton, what is
your occupation? [58]

A. Mining engineer.

Q. Are you connected with the Petitioner, Con-
solidated Chollar Gould & Savage Mining Com-
pany?

A. As General Manager.

Q. And Vice President also?

(Testimony of Thomas V. Barton.)

A. Yes, sir.

Q. That company owns the lands on which the dumps are located that are involved in this matter, does it not? A. Yes, sir.

Q. Owns those lands in fee? A. In fee.

Q. Is it a fact that the Petitioner purchased those lands on which the dumps were located on July 1, 1933?

A. I think that is correct, about that time.

Mr. Gallaher: There is no question about that?

Mr. Horrow: There is no question about the date.

Q. (By Mr. Gallaher): Were these dumps in question on the land when it was purchased by the Petitioner? A. Yes, sir.

Q. Had they been processed to any extent whatever when the Petitioner purchased the land?

A. None whatever.

Q. Now, in 1936 and also in 1938 the Petitioner did process a portion of those dumps; is that so?

A. Yes. I just forgot exactly what year we started but I [59] would say '36.

Q. In '36 and again in 1938? A. Yes, sir.

Q. And as a result of processing the Petitioner made some profit? A. Yes, sir.

Q. Now, will you state whether or not there was any segregation made in the rock when it was placed upon that land as you found it when you bought it?

A. No, there was no segregation definitely. That

(Testimony of Thomas V. Barton.)

would be proved by the character in which we found it when we started digging into it.

Q. Will you describe what that character was?

A. Well, there were obvious layers of waste overlaying commercial ore. There was also waste underlying certain sections of commercial ore. Had it been segregated the individual dumps would have shown it. Each layer was sort of a lamination starting from the top of the dump to its toes, as Mr. Slosson explained, the fines remaining on the higher parts of the dump. The laminations or the various periods were in very definite layers and one could almost indicate the extent of the material, the particular material by the width of those layers. You didn't recognize that until you started virtually cross-cutting in the conveying of these dumps to the mill, but there was very definite [60] evidence that they had never been removed, or never had been moved since they were originally placed there and there was no segregation.

Q. Where is the mill?

A. As to the dumps?

Q. Yes.

A. Oh, 2000 feet from the dumps southeast.

Q. The Petitioner operates its own mill, does it not?

A. Pardon me?

Q. The Petitioner operates its own mill, does it not?

A. Yes, sir.

Q. And what is the method used for processing the material constituting those dumps?

(Testimony of Thomas V. Barton.)

A. At the time we were handling the dumps, flotation.

Q. Will you describe to the Court what that method is, briefly.

A. Well, it is a method, your Honor, of crushing into required mesh when it is subjected to certain agents that have an affinity and then it is frothed and the froth reverses the laws of gravity by allowing the heavy particles to float over the top of the water and the gangue or lighter material sinking, and after the froth has come off—it is scraped off the top and then the bubbles have broken and the concentrate is shipped to the smelter. It is a cheaper process actually in the process itself but there *are* a lot of disadvantages [61] tages. The ratio of extraction is not very high and so ultimately we changed to cyanide which is a more efficient form of extraction.

The Member: How does that work, the cyanide treatment?

The Witness: Well, it is dissolving all values into solution and then precipitating, whereas, you make a concentrate in one you dissolve the values and precipitate and turn into bullion.

Q. (By Mr. Gallaher): I show you a picture, Mr. Barton, and ask you if you recognize that?

A. (Examining photograph): Yes, sir.

Q. What is that a picture of?

A. That is a picture of the Overman works, the Consolidated Chollar general mining here (indi-

(Testimony of Thomas V. Barton.)

cating), and the mill and the dumps in question over to the right. (Indicating).

Mr. Gallaher: We offer this in evidence.

Mr. Horrow: No objection. I would suggest, however, that there be some identification of it.

Mr. Gallaher: I was going—

Mr. Horrow (Interposing): Of the structures referred to.

Mr. Gallaher: I was going to do that after it was admitted.

Mr. Horrow: Yes, I have no objection.

The Member: Accepted in evidence. [62]

The Clerk: Exhibit 1.

(The photograph so offered and received in evidence, was marked Petitioner's Exhibit 1, and was made a part of this record.)

Q. (By Mr. Gallaher): Now, will you describe again what the various things are on that picture?

A. Well, over here on the extreme right (indicating) are the dumps.

Q. That is indicating a white spot about two inches from the right hand side of the picture and about the center vertically?

A. Yes, sir, and it is shown up to be of that color, because I think at the time this picture was taken we had removed quite a large portion of this dump. It isn't in its original form. If you notice, it looks a little jagged. We had already taken quite a large amount of it.

(Testimony of Thomas V. Barton.)

Over here (indicating) is the Overman shaft headframe.

Q. Indicating the building toward the left of the picture?

A. The furthest to the left is the mill. The white place over here (indicating) is the dump.

Q. Well, you mean——

A. (Interposing): I mean the tailings pond.

Q. The white place to the extreme left of the picture is what you term the tailings pond?

A. Tailings pond, yes. This is the dump here (indicating).

Mr. Horrow: This is the mill here (indicating)?

[63]

The Witness: The mill is here (indicating).

Q. (By Mr. Gallaher): Indicating the building farthest to the left. What is the large building in the center?

A. That is the office building.

Q. And the building farthest to the right is the Overman shaft?

A. No; the shaft is here (indicating), right behind the blacksmith shop, the machine shop.

The Member: Accepted in evidence.

Q. (By Mr. Gallaher): I show you three pictures and ask you if any of those three show the dumps as they were before you started to process them?

A. (Examining photographs): No, sir, none of these prior to processing.

(Testimony of Thomas V. Barton.)

Q. Which one is the earliest of the three, if you know?

A. Well, these are the dumps that we took (indicating). These are the dumps under discussion and you can tell by this appearance there that there has already been quite a large portion of them taken away. I don't think we have any dump pictures prior to our operations.

Mr. Horrow: I have no objection to using the one that shows the condition of the dumps at the point of time closest to the beginning of the processing.

Q. (By Mr. Gallaher): I believe that is this one, is it not?

A. What is that? I didn't understand that question. [64]

Q. The earliest picture.

A. (Examining photographs). I think they were all taken about the same time, only in different positions, because you see that dump (indicating) is practically the same as this (indicating) and it is just taken in a different position because these dumps here (indicating) are what these dumps are on, and, I think, consequently are taken the same time.

Mr. Gallaher: I offer these three pictures in evidence.

The Member: No objection?

Mr. Horrow: I have no objection except I suggest they be identified so your Honor can make use of them.

(Testimony of Thomas V. Barton.)

The Member: As I gathered from the witness there is not much difference between the three, is there?

Mr. Horrow: I see.

Mr. Gallaher: No, not much, not much. I don't insist upon placing them in evidence. I thought they might be of some assistance to the Court.

Mr. Horrow: I have no objection just so long as——

The Member (Interposing): All right, they will be admitted as Petitioner's Exhibits 2, 3, and 4.

(The three photographs, so offered and received in evidence, were marked Petitioner's Exhibits 2, 3, and 4, and were made a part of this record.)

The Member: Is this property as shown in Petitioner's [65] Exhibit No. 1, Mr. Witness, near the road from Virginia City to Reno?

The Witness: To Carson, your Honor. This is down the—if you know the district, this is below Virginia City, Gold Hill, on the way down towards Carson and Silver City.

The Member: I see.

The Witness: It is half way between Silver City and the Divide.

The Member: Oh!

The Witness: And that would put the road just east of about where your thumb is on this side, you see. You can't see the road, but it is very close to the bottom of the picture.

(Testimony of Thomas V. Barton.)

The Member: Off the record.

(Discussion outside the record.)

The Member: All right, counsel.

Mr. Gallaher: That is all.

Cross-Examination

Q. (By Mr. Horrow): Mr. Barton, will you state the method that was used in removing the ore materials from the dumps to the mill?

A. The what?

Q. The method that was used in removing the ore materials from the dumps to the mill for processing. [66]

A. Power shovel.

Mr. Gallaher: What time?

The Witness: And truck.

Mr. Gallaher: Pardon me, and what time is this, counsel?

Mr. Horrow: As at the time the Petitioner first removed ore materials from the dumps.

The Witness: That is the only way we did it at any time.

Q. (By Mr. Horrow): What was that method, Mr. Barton?

A. With a power shovel and trucks. The question was how did they convey the material from the dumps to the mill?

Q. That is right.

The Member: That is right.

A. Yes, sir.

Q. (By Mr. Horrow): The ore materials were

(Testimony of Thomas V. Barton.)

scooped up by the shovels and dumped into the trucks and conveyed to the mill; is that correct?

A. Yes, sir.

Q. Now, when was that mill erected?

A. Well, we have made four changes, and I couldn't be definite, but I think in '34 or '35.

Q. The mill was erected after the dumps had been acquired by Petitioner, is that correct?

A. Oh, no; we acquired the property in '33. The mill was built in '34 or '5; I wouldn't be sure. We started with a little 50-ton mill and now we have a 500 and have made so [67] many changes I really forget the actual dates but we did not start milling off the dumps immediately. We had other ore bodies at that time that contained more value. It was not until later when the price of gold jumped 70 per cent we were able to make this of commercial value.

Mr. Morrow: That is all, your Honor.

Mr. Gallaher: That is all.

The Member: That is all, Mr. Barton.

(Witness excused.)

Mr. Gallaher: May I recall Mr. Slosson for one further question?

The Member: Yes, sir.

HENRY L. SLOSSON, JR.

a witness recalled on behalf of Petitioner, having

(Testimony of Henry L. Slosson, Jr.)

been previously duly sworn, testified further as follows:

Redirect Examination

Q. (By Mr. Gallaher): Mr. Slosson, do you know whether or not any of the material constituting the dumps was placed in its present position after 1913?

A. Oh, no, none of it. Those mines were all shut down.

Mr. Gallaher: That is all.

Mr. Horrow: I have no further questions.

The Member: That is all, Mr. Slosson.

(Witness excused.) [68]

The Member: Does Petitioner have further testimony?

Mr. Gallaher: May I be pardoned for a moment?

The Member: Yes, sir.

Mr. Gallaher: May I have the indulgence of the Court to recall Mr. Barton for one question?

The Member: Yes.

THOMAS V. BARTON

a witness recalled on behalf of Petitioner, having been previously duly sworn, testified further as follows:

Redirect Examination

Q. (By Mr. Gallaher): Mr. Barton, when the Petitioner purchased the property on which the

(Testimony of Thomas V. Barton.)

dumps were located was the ore in the rock, in its natural condition in the rock?

Mr. Horrow: Same objection as previously noted, your Honor.

A. Surely.

The Member: I don't—

Mr. Horrow (Interposing): I think it is argumentative.

The Member: Well, I mean I think it is almost to be taken for granted. Your question is whether or not these dumps were composed of rock that had never been processed. Isn't that, in effect, your question?

Mr. Gallaher: Yes, and to bring out that the metal is naturally deposited in the rock just as it was originally, [69] except the rock itself has been moved from one point to another.

The Member: Well, the only alternative to that would be that the metal got into the rock by some artificial way which I don't consider to be feasible.

Mr. Gallaher: I thought that was clear myself, if your Honor please. That is all.

The Member: Any other questions?

Mr. Horrow: I have nothing further.

The Member: I will overrule this objection so the witness can answer.

Have you answered the question?

The Witness: I don't know, sir.

The Member: Read the question to the witness.

Mr. Horrow: Exception.

(Testimony of Thomas V. Barton.)

The Member: Exception granted.

(The question referred to was read by the reporter as above recorded.)

A. Certainly.

The Member: Any other questions?

Mr. Horrow: Just one question.

Recross Examination

Q. (By Mr. Horrow): How high would you say was the highest point on the dumps?

A. Vertical height to the top of the dumps? [70]

Q. Yes.

A. Well, I am guessing to a certain extent but I would say 60 to 80 feet.

Q. So that, in your opinion as a mining engineer, if materials were taken from three different mining shafts and deposited in the same place the effect of depositing these materials on top of each other would cause a cohesive effect upon those materials so that they would all be pushed together?

A. Not exactly.

Q. Well, what would be the effect of depositing ore materials on top of materials that had been previously deposited on the surface?

A. Unless the particular materials carried chemicals that would have an altering effect on it there would be no change whatever.

Q. Well, now, you are familiar with the condition of ore material as it comes from the shaft of the mine upon blasting? A. Yes, sir.

Q. Would you say that the ore materials that

(Testimony of Thomas V. Barton.)

were in these dumps were in the same condition as they were when they came from the head of the shaft after having been blasted?

A. No doubt about it.

Q. So that if the materials came out of the mine in fragments because of blasting those fragments were still in exactly the same physical state after having been deposited and other [71] materials deposited on top of those materials?

A. Exactly the same except where they, probably through bouncing down the dump they may have reduced themselves in size, the larger portions; otherwise, they were the same.

Q. In your opinion as a mining expert would the debris or the ore materials resulting from the blasting commingle with other such materials upon being deposited together?

A. Not to any great extent, sir. The idea, as I told you at the first, was they more or less stay in the layers, that is, if there are any quantities that come out of each section.

Q. Well, now, Mr. Barton, when the ore materials were removed by the power shovel from the dumps were any blasting operations necessary to facilitate the removal of the ore materials from the dumps?

A. No, sir, with the exception that sometimes when the bank got a little too steep for the shovel to handle there would be a pipe driven down and a

(Testimony of Thomas V. Barton.)

few sticks of powder just to shake the top down so it wouldn't cover the shovel up.

Mr. Horrow: That is all, your Honor.

Redirect Examination

Q. (By Mr. Gallaher): Mr. Barton, do you know what the type of rock is that constitutes the dumps? A. The what?

Q. The type of rock? [72]

A. Well, the type that we were interested in was the quartz.

Q. Quartz is very hard, is it not?

A. It was the harder, yes, but had been in its native state subjected to a shattering. The general condition of the dumps was not known as what would be termed a coarse dump. There was a large percentage of it quite fine, which is the condition as it is handled underground all along that section of the lode.

Mr. Gallaher: That is all.

Mr. Horrow: No further questions.

The Member: That is all, Mr. Barton.

(Witness excused.)

Mr. Gallaher: We are prepared, if your Honor please, to stipulate as to the figures.

May I suggest that we reduce the stipulation to writing and file it in the record at a later time? We weren't prepared to do that before we arrived here today.

The Member: Well, you can dictate it into the

record if you would care to. Suppose then we take a recess at this time and you can consult together with regard to the stipulation.

Mr. Horrow: I can say, your Honor, we are in agreement with the figures. I can read them into the record and Mr. Cummings, the accountant can check them.

The Member: Suppose we take a recess. [73]

Mr. Horrow: Very well, your Honor.

(Whereupon a short recess was taken after which the proceedings were resumed as follows:)

Mr. Horrow: If your Honor please, we are prepared to stipulate the figures as to the taxable income of Petitioner for the years '36 and '38 and the source of the income.

We will stipulate that the net income before depletion for 1936 is \$22,610.70, that income was derived by Petitioner during that year from the milling of dump ores, which are the dump ores in question, and in respect of which percentage depreciation is claimed, the amount of said income being \$71,211.40, that Petitioner sustained a loss from mining operations, that is, operations in connection with the extracting of ores from underneath the surface and the milling of said ores, said loss being in the amount of \$53,397.29. Further that Petitioner for 1936 realized a profit from the ores which Petitioner purchased from other persons in the amount of \$4,796.58. The latter amount is not income in

respect of which Petitioner is claiming a deduction for percentage depletion.

I might say that these are the figures that are set forth in the deficiency notice for 1936.

For the year 1938 Petitioner's taxable net income before depletion is \$9,425.25, that Petitioner realized income from mining operations, that is, the extraction of [74] ores from underneath the surface and the processing of said ores, said profit being in the amount of \$2,343.19.

The Respondent will stipulate that that income is subject to percentage depletion.

The income from the processing of ores from the dumps in question and in respect of which Petitioner is claiming an allowance for percentage depletion for the year 1938 was \$2,924.12. Petitioner realized income from the processing of ore purchased from other persons in the amount of \$3,792.18. Said income is not income in respect of which percentage depletion is being claimed.

Petitioner also realized for 1938 other income such as interest and similar income in the amount of \$365.76 and said income is likewise not income in respect of which percentage depletion is being claimed.

Is that stipulation satisfactory?

Mr. Gallaher: That stipulation is satisfactory.

The Member: Anything else, gentlemen?

Mr. Gallaher: That is all, if your Honor please.

The Petitioner rests.

Mr. Horrow: Respondent rests.

The Member: Briefs to be filed within 45 days, and reply briefs within 30 days thereafter.

Thank you, gentlemen.

(Hearing concluded.)

[Endorsed]: U. S. B. T. A. Filed July 14, 1941.

————— [75]

[Title of Board and Cause.]

FINDINGS OF FACT AND OPINION

Docket Nos. 104195, 105095. Promulgated February 4, 1942.

Petitioner acquired property in Nevada upon which were "dumps" composed of broken ore-bearing rock taken from mines located on adjacent property. At the time the "dumps" were placed on petitioner's property they were considered worthless. As a result of improvements in extracting methods the contents of these dumps were milled by petitioner at a profit. Held, these "dumps" are not mines and petitioner is not entitled to percentage depletion under sections 23 (m) and 114 (b) (4) of the Acts of 1936 and 1938. *Atlas Milling Co. v. Jones*, 115 Fed. (2d) 61, followed; *Kennedy Mining & Milling Co.*, 43 B. T. A. 617, distinguished.

John D. Gallaher, Esq., and William A. Boekel, Esq., for the petitioner.

Harry R. Horrow, Esq., for the respondent.

These proceedings, consolidated for hearing and decision, involve deficiencies determined by respondent.

ent in petitioner's income tax for the years 1936 and 1938 in the respective amounts of \$3,625.45 and \$676.59: The petitions herein put at issue that part of the deficiencies which arises by reason of respondent's refusal to allow petitioner percentage depletion under the provisions of section 114 (b) (4) of the Revenue Acts of 1936 and 1938,¹ with respect to income derived by petitioner from the extraction of ores from "dumps" composed of broken rock taken from mines adjacent to petitioner's property. [76]

FINDINGS OF FACT

The petitioner is a corporation organized under the laws of the State of California, with its principal office at San Francisco, California. It filed its in-

¹ Sec. 114. Basis for Depreciation and Depletion.

* * * * *

(b) Basis for Depletion.—

* * * * *

(4) Percentage Depletion for Coal and Metal Mines and Sulphur.—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of Sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. * * *

come tax returns for the calendar years 1936 and 1938 with the collector of internal revenue for the first district of California. On or about July 1, 1933, petitioner acquired by purchase from the Bullion Gold & Silver Mining Co. property known as the American Flat property, located near Virginia City, Nevada. At all times during the years 1936 and 1938 petitioner was the owner in fee of said property.

On its income tax returns the petitioner elected to have its depletion allowance computed on the basis of percentage depletion. During the year 1936 the petitioner derived income from the processing of certain dump ores, located on the American Flat property, known as the Yellow Jacket and Belcher dumps, in the amount of \$71,211.40. In arriving at the deficiency involved for the year 1936, the respondent did not include this amount in depletion net income for purposes of computing percentage depletion under section 114 (b) (4) of the Revenue Act of 1936. During the year 1938 petitioner realized income from the processing of ores in these dumps in the amount of \$2,924.12. Respondent did not allow petitioner any deduction for percentage depletion for said year.

The dumps, referred to above, were created during the period between 1872 and 1898. None of the ore materials in these dumps had ever been milled, nor had any attempt been made prior to their purchase by petitioner to extract any minerals from them. At the time they were created, there were no mills for processing located on the American Flat property.

The ore materials constituting these dumps could not have been milled at a profit at the time they were deposited in the dumps.

On the American Flat property there is located only one shaft for the conduct of mining operations, known as the Overman shaft. However, on property adjacent to the American Flat property, there were located shafts known as the Yellow Jacket, Crown Point, Kentuck, and Belcher. None of these shafts was located on the property purchased by petitioner. All of the ore materials in the dumps in question were extracted from the mines known as Yellow Jacket, Kentuck, Crown Point, and Belcher. The owners of these mines had the privilege of dumping their waste ore materials extracted from their mines on the American Flat property. The American Flat property prior to 1907 was owned by the Overman Mining Co. None of the ore materials from the Overman shaft were placed in the dumps in question. This company had a separate dump of its own near its own shaft, but at the time the ore materials from the other mines [77] were dumped on this property, it was considered that the Overman Mining Co. thereby became the owner of these materials.

These materials were extracted from the mines referred to by blasting. They were then hoisted to the top of the shafts and dumped into bins, and then carried out to the dumps on iron cars drawn by mules.

In 1907 the dumps were several hundred feet high, with the coarser rock at the bottom and the finer ore

materials at the top. As a rule, the coarse rock rolled down to the bottom of the dump leaving the finer materials on top. When petitioner began removing the ore materials in the dumps, it was discovered that there was no segregation of the waste ore materials and the commercial ore materials. There were various layers in the dumps, however, which showed that the finer ore materials remained on the higher part of the dumps.

Petitioner erected a mill in 1934 about 2,000 feet from the dumps. At first it used the flotation process for removing the mineral content in the ore materials constituting the dumps. Thereafter, the petitioner resorted to the cyanide process for this purpose. The ore materials were removed from the dumps to the mill for processing by use of a power shovel. They were then dumped into trucks, which conveyed the materials to the mill.

The dumps in question did not constitute a mine, and none of the income derived by petitioner from the processing of ore materials located in the dumps during the years 1936 and 1938 constituted income from a mine for purposes of percentage depletion under the provisions of section 114 (b) (4) of the Revenue Acts of 1936 and 1938.

OPINION

Kern: The question which is here presented for decision is whether the "dumps" which were deposited upon petitioner's premises from adjacent mines and from which ore was extracted can be con-

sidered as a mine within the meaning of section 114 (b) (4), set out above, and section 23 (m),² which sections appear as quoted in the Revenue Acts for both 1936 and 1938. [78]

In *Atlas Milling Co. v. Jones*, 115 Fed. (2d) 61 (certiorari denied, 312 U. S. 686), the taxpayer, pursuant to its rights under a lease contract, went

² Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

* * * * *

(m) Depletion.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this subsection for subsequent taxable years shall be based upon such revised estimate. In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each. For percentage depletion allowable under this subsection, see section 114 (b), (3) and (4).

upon certain lands and removed crushed rock which constituted the residue from mining and milling operations carried on by the owners of the premises. By reason of a new extraction process it had become profitable to remill and retreat such "tailings" or residue. This the taxpayer did. It was held that taxpayer was not entitled to percentage depletion. In its opinion the court said in part:

A "mine" is an excavation in the earth from which ores, coal, or other mineral substances are removed by digging or other mining methods. In its broader sense it denotes the vein, lode, or deposit of minerals. Mining connotes the removal of minerals from a natural deposit. It does not embrace the reworking of mineral dumps artificially deposited from the residue remaining after the ore has been milled and concentrates removed therefrom. So. *Utah Mines & Smelters v. Beaver County*, 262 U. S. 325, 332. In the case last cited the court said:

The tailings severed and removed from the mining claims, changed in character, placed on other and separate lands and having an ascertained and adjudicated value of their own, in our opinion, constituted a unit of property entirely apart from the mine from which they had been taken. See *Forbes v. Gracey*, 94 U. S. 762, 765.

Ores when severed from their natural deposit become personal property. Trover and conversion will lie for their wrongful taking.

While tailings deposited on the surface of land may become appurtenant to the land, they in no true sense become a mine.

We are of the opinion that the word "mines" as used in, § 23, supra, is limited to natural deposits and does not include a tailings dump deposited on the surface of land, consisting of the residue of ore that has been severed and milled.

* * * * * * *

* * * Here, Atlas (the taxpayer) owns no economic interest in the mine from which the minerals were severed. To entitle it to depletion we would have to hold that the tailings, not a natural deposit but ore-bearing rock artificially deposited on the surface of the ground, constitutes a mine within the meaning of § 23, supra. We are of the opinion that it may not be so regarded. * * *

Petitioner here seeks to distinguish this proceeding from that case. It argues that there the court had before it a problem having to do with "tailings" made up of the residue of rock left after it had once been milled, whereas here the dumps were made up of broken rock which had never been milled and within which the ore was still deposited. [79]

We consider this difference to be immaterial. The dumps of petitioner were of "ore-bearing rock artificially deposited on the surface of the ground", and the petitioner had no economic interest in the mines from which such rock was severed. These are the determinative facts which bring this proceeding

within the reasoning of *Atlas Milling Co. v. Jones*, *supra*. See also *Carl M. Britt*, 43 B. T. A. 254.

The distinction between this proceeding and *Kennedy Mining & Milling Co.*, 43 B. T. A. 617, is obvious. In that case the "tailings" were from ore-bearing rock severed from mines owned and operated by the taxpayer. Under those circumstances, we said:

* * * The economic interest of this petitioner in the tailings and in the minerals to be extracted therefrom was identical with the interest it had maintained through its ownership of the mine from beginning to end of the extractive process; and when it finally received the proceeds of the minerals contained in the tailings it received income from the contents of the mine to exactly the same extent as the income it had previously received from the earlier and more rudimentary refining process. * * *

Deductions for depletion are matters of legislative grace, *Ozark Chemical Co. v. Jones*, — Fed. (2d) — (C. C. A., 10th Cir., Dec. 23, 1941), and none more so than deductions on account of percentage depletion. Since the petitioner has not brought itself clearly within the act, he can not claim the deduction sought.

At the hearing herein the parties entered into certain stipulations with regard to petitioner's income for the years in question to which consideration shall be given by counsel in preparing recomputations of petitioner's tax liability in accordance with this opinion.

Decision will be entered pursuant to Rule 50. [80]

United States Board of Tax Appeals
Washington

Docket No. 104195

CONSOLIDATED CHOLLAR GOULD & SAV-
AGE MINING COMPANY, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the findings of fact and opinion of the Board promulgated February 4, 1942, the respondent herein on March 4, 1942 having filed a recomputation of tax and the petitioner on March 23, 1942 having filed an agreement to such recomputation, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1936 in the amount of \$3,625.45.

(Signed) C. R. ARUNDELL
Member

Enter:

Entered Mar. 25, 1942. [81]

United States Board of Tax Appeals
Washington

Docket No. 105095

CONSOLIDATED CHOLLAR GOULD & SAV-
AGE MINING COMPANY, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the findings of fact and opinion of the Board promulgated February 4, 1942, the respondent herein on March 4, 1942 having filed a recomputation of tax and the petitioner on March 23, 1942 having filed an agreement to such recomputation, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1938 in the amount of \$512.57.

(Signed) C. R. ARUNDELL
Member

Enter:

Entered Mar. 25, 1942. [82]

In the United States Circuit Court of Appeals
For the Ninth Circuit

B. T. A. Docket Nos. 104195 and 105095

CONSOLIDATED CHOLLAR GOULD & SAV-
AGE MINING COMPANY,

Petitioner on Review,

v.

GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE,

Respondent on Review.

PETITION FOR REVIEW AND STATEMENT
OF POINTS

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

Now Comes Consolidated Chollar Gould & Sav-
age Mining Company, a corporation, by its attor-
neys, William A. Boekel and John D. Gallaher, and
respectfully shows:

I.

JURISDICTION

The petitioner on review (hereinafter referred to
as the taxpayer) is a corporation organized and ex-
isting under the laws of the State of California,
having its principal office in the Kohl Building, San
Francisco, California. [83]

The respondent on review, Guy T. Helvering, is
the duly appointed, qualified and acting Commis-

sioner of Internal Revenue of the United States.

The taxpayer filed its Federal income tax returns for the taxable years 1936 and 1938 with the Collector of Internal Revenue for the First District of California, whose office is located in the City and County of San Francisco, State of California, and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

The taxpayer files this petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II.

PRIOR PROCEEDINGS

On May 14, 1940 the Commissioner of Internal Revenue determined a deficiency in Federal income taxes against the taxpayer for the year 1936 in the amount of \$3,625.45 and on the same date mailed a notice to the taxpayer notifying the taxpayer of such determination. On July 11, 1940 the Commissioner of Internal Revenue determined a deficiency in Federal income taxes against the taxpayer for the year 1938 in the amount of \$655.45 and on the same date mailed to the taxpayer a notice of such determination. Within ninety days after the mailing of said notices respectively, the taxpayer filed appeals from said determinations of the Commissioner with the United States Board of Tax Appeals, Docket Nos. 104195 [84] and 105095.

The appeals were consolidated for hearing and decision and were duly tried and submitted to the

United States Board of Tax Appeals and under date of February 4, 1942, the Board promulgated its findings of fact and opinion (46 B. T. A. No. 34), pursuant to which opinion decisions were entered by the Board on March 25, 1942 wherein and whereby it was ordered and decided that there was a deficiency in income tax for the calendar year 1936 in the amount of \$3,625.45 and a deficiency in income tax for the calendar year 1938 in the amount of \$512.57.

III.

NATURE OF CONTROVERSY

The taxpayer is a mining corporation organized and existing under the laws of the State of California. On or about July 1, 1933 the taxpayer acquired by purchase from the Bullion Gold and Silver Mining Company, mining property known as the American Flat property, located near Virginia City, Nevada. At all times during the years 1936 and 1938 the taxpayer was the owner in fee of said property.

During the years 1936 and 1938 the taxpayer derived income from processing certain dumps located upon the American Flat property known as the "Yellow Jacket" and "Belcher" dumps. The rock and material constituting these so-called dumps had been removed from mines adjacent to the American Flat property and had been placed upon the American Flat [85] property during the period between 1872 and 1898. Such material had never been

processed and no attempt had ever been made to extract precious metals therefrom until the taxpayer commenced processing the same in the year 1936. The dumps were on the American Flat property acquired by the taxpayer at the time of the acquisition thereof and were owned by the taxpayer during the years 1936 and 1938.

The taxpayer filed its first income tax return for the calendar year 1933 and elected at the time of making said return to have the depletion allowance for its mining property for the taxable year 1934 and subsequent taxable years computed with regard to percentage depletion under the provisions of Section 114 (b) (4) of the Revenue Act of 1932, and again elected at the time of filing its return for the year 1934 to have the depletion allowance for the taxable year 1934 and subsequent taxable years computed with regard to said percentage depletion under the provisions of Section 114 (b) (4) of the Revenue Act of 1934. The taxpayer, in its income tax returns for the years 1936 and 1938 deducted percentage depletion upon its income from processing the ore materials constituting said dumps. The commissioner disallowed the deductions insofar as they were based upon such income. The Board of Tax Appeals was of the opinion that said dumps did not constitute a mine and that percentage depletion was therefore not allowable under the provisions of Section 114 (b) (4) of the Revenue Acts of 1936 and 1938. [86]

IV.

STATEMENT OF POINTS

Following is a concise statement of the points upon which the taxpayer intends to rely on the review herein petitioned, to-wit:

The United States Board of Tax Appeals erred:

1. In failing to hold that the ores and precious metals were naturally deposited in the dumps in question and that the same constituted a part of the taxpayer's mine within the meaning of Section 114 (b) (4) of the Revenue Acts of 1936 and 1938.

2. In holding that percentage depletion under said section of said acts is not allowable with respect to income derived from processing said dumps.

3. In holding that there were deficiencies in the income tax returns of the taxpayer for the years 1936 and 1938 by reason of the disallowance of the percentage depletion claimed by the taxpayer for those years.

4. In that its opinion and decision are contrary to its findings of fact.

5. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

Wherefore, the taxpayer petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth [87] Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to

the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

WILLIAM A. BOEKEL
JOHN D. GALLAHER

Attorneys for Petitioner
on Review

604 Federal Reserve Bank
Building,
San Francisco, California.

[Endorsed]: U. S. B. T. A. Filed June 24, 1942.

[88]

[Title of Board and Cause—Dockets Nos. 104195,
105095.]

NOTICE OF FILING PETITION FOR REVIEW
AND STATEMENT OF POINTS

To the General Counsel of the Bureau of Internal
Revenue, Washington, D. C.

You are hereby notified that Consolidated Chollar
Gould & Savage Mining Company did, on the 24th
day of June, 1942, file with the Clerk of the United
States Board of Tax Appeals at Washington, D. C.
a petition for review by the United States Circuit
Court of Appeals for the Ninth Circuit of the de-
cision of the Board heretofore rendered in the above
entitled cases and a statement of points. A copy of

the petition for review and the statement of points as filed is hereto attached and [89] served upon you.

Dated this 24th day of June, 1942.

WILLIAM A. BOEKEL

JOHN D. GALLAHER

Attorneys for Petitioner
on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and statement of points mentioned therein is hereby admitted this 24th day of June, 1942.

(s) J. P. WENCHEL

C. S. R.

Chief Counsel

Bureau of Internal Revenue

[Endorsed]: U.S.B.T.A. Filed June 24, 1942. [90]

[Title of Board and Cause—Dockets Nos. 104195,
105095.]

DESIGNATION OF CONTENTS OF RECORD
ON REVIEW

To the Clerk of the United States Board of Tax
Appeals:

Now Comes Consolidated Chollar Gould & Savage Mining Company, a corporation, the petitioner on review herein, by and through its attorneys, William A. Boekel and John D. Gallaher, and for the purpose of the review which it, the said petitioner on review has heretofore taken to the United States Circuit

Court of Appeals for the Ninth Circuit, hereby designates for inclusion in the record on review the following in the above numbered cases, Docket Nos. 104195 and 105095: [91]

1. Docket entries of the proceedings before the Board in each case.
2. Pleadings before the Board in each case:
 - (a) Petition, including exhibits attached thereto.
 - (b) Answer.
3. The entire record of the proceedings before the Board at San Francisco, California on June 27, 1941, as contained in the phonographic reporter's transcript of such proceedings, including the exhibits. In this connection for the purposes of convenience, petitioner on review respectfully suggests that pursuant to Rule 75 (i) of the Rules of Civil Procedure for the District Courts of the United States, Exhibits Nos. P-1, P-2, P-3 and P-4 be sent to the Appellate Court in lieu of copies.
4. Findings of fact and Opinion of the Board promulgated February 4, 1942.
5. Decision entered March 25, 1942, in each case.
6. Petition for review and statement of points.
7. Notice of filing petition for review.
8. This designation of contents of record on review.

Wherefore, it is requested that copies of the rec-

ord as above designated be prepared and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, in accordance with the rules of said Court.

WILLIAM A. BOEKEL

JOHN D. GALLAHER

Attorneys for Petitioner
on Review. [92]

Personal service of the above and foregoing Designation of Contents of Record on Review is hereby acknowledged this 24th day of June, 1942.

(s) J. P. WENCHEL

(Illegible initial)

Chief Counsel Bureau of
Internal Revenue.

[Endorsed]: U. S. B. T. A. Filed June 24, 1942.
[93]

[Title of Board and Cause — Docket Nos. 104195,
105095.]

CERTIFICATE OF CLERK

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 93, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax

Appeals, at Washington, in the District of Columbia, this 7th day of July, 1942.

[Seal]

B. D. GAMBLE

Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 10198. United States Circuit Court of Appeals for the Ninth Circuit. Consolidated Chollar Gould & Savage Mining Company, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed July 21, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

B. T. A. Docket Nos. 104195 and 105095.

CONSOLIDATED CHOLLAR GOULD & SAVAGE
MINING COMPANY,

Petitioner on Review,

v.

GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE,

Respondent on Review.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD.

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

Now Comes Consolidated Chollar Gould & Savage Mining Company, a corporation, the petitioner on review herein, and designates for printing the entire transcript as certified by the Clerk of the Board of Tax Appeals and adopts as the points on which it intends to rely on appeal the statement of the points appearing in said transcript.

Dated: This 30th day of July, 1942.

WILLIAM A. BOEKEL,
JOHN D. GALLAHER,
Attorneys for Petitioner
on Review.

Service and receipt of a copy of the foregoing is hereby admitted this 1st day of August, 1942.

J. P. WENCHEL,
Chief Counsel Bureau of
Internal Revenue.